

No. 866

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

OHLIN H. ADSIT,

*Plaintiff in Error,*

vs.

G. KAUFMAN,

*Defendant in Error.*

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TRANSCRIPT OF RECORD.

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Upon Writ of Error to the United States District  
Court for the District of Alaska,  
Division No 1.

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FILED  
SEP 13 1902



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*In the United States District Court for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

Plaintiff,

vs.

No. 75A.

G. KAUFMAN,

Defendant.

**Stipulation Extending Time to Docket Cause.**

It is hereby stipulated by and between the parties to the above-entitled action and by their respective attorneys, that owing to the uncertainty of the arrival at, and departure from, Juneau, Alaska, of the United States Mails, the plaintiff herein, said Ohlin H. Adsit, shall have until the 15th day of August, 1902, within which time to file his record on writ of error, in the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, in the same manner with the like effect as if done by order of the Court.

Dated July 17, 1902.

JOHN G. HEID,

Attorney for Plaintiff.

MALONY & COBB,

Attorneys for Defendant.

[Endorsed]: No. 75A. In United States District Court for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Stipulation. Filed July 16, 1902. W. J. Hills, Clerk.

United States of America, }  
 District of Alaska, } ss.  
 Division No. 1.

I, W. J. Hills, Clerk United States District Court for District of Alaska, Division No. 1, do hereby certify that the above and foregoing is a full, true and correct copy of a stipulation filed this day in the above-entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of the Court this 16th day of July, 1902.

[Seal] W. J. HILLS,  
 Clerk United States District Court for District of Alaska,  
 Division No. 1.

By J. J. Clarke,  
 Deputy Clerk.

[Endorsed]: No. 866. United States Circuit Court of Appeals for the Ninth Circuit. Ohlin H. Adsit, vs. G. Kaufman. Stipulation Extending Time to Docket Cause. Filed July 25, 1902. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.



*In the United States District Court for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff,

Defendant.

No. 75A.

**Writ of Error.**

The President of the United States of America, to the  
Judge of the United States District Court, for the  
District of Alaska, Division No. 1, Greeting:

Because of the record and proceedings, and also in the  
rendition of the judgment of a plea which is in the said  
United States District Court, for the District of Alaska,  
Division No. 1, before you, between Ohlin H. Adsit, as  
plaintiff, and G. Kaufman, as defendant, a manifest error  
hath happened to the great damage of the said Ohlin H.  
Adsit, plaintiff in error, as by its complaint appears, and  
it being fit, that the error, if any there hath been, should  
be duly corrected, and full and speedy justice be done to  
the parties aforesaid in this behalf, you are hereby com-  
manded, if judgment be therein given, that then, under  
your seal, distinctly and openly, you send the record and  
proceedings aforesaid, with all things concerning the  
same, to the United States Circuit Court of Appeals for  
the Ninth Circuit, together with this writ, so that you

have the same at the courtrooms of the said court in the Customs-house Building, in San Francisco, California, on the 25th day of July, 1902, in the said Court of Appeals to be there and then held, that the record and proceedings aforesaid be inspected; the said United States Circuit Court of Appeals may cause further to be done there to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 25th day of June, in the year of our Lord, one thousand nine hundred and two, and of the independence of the United States the one hundred and twenty-sixth.

[Seal]

W. J. HILLS,

Clerk of the United States District Court, for Alaska,  
Division No. 1.

The above writ of error is hereby allowed.

M. C. BROWN,

Judge United States District Court, for District of  
Alaska, Division No. 1.

[Endorsed]: No. 75A. United States District Court, at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Writ of Error. Filed June 26, 1902. W. J. Hills, Clerk,

*In the United States Circuit Court of Appeals, for the Ninth  
Circuit.*

OHLIN H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff,

Defendant.

**Citation.**

United States of America—ss.

To G. Kaufman, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, California, on the 25th day of July, 1902, pursuant to a writ of error filed in the clerk's office in the United States District Court, for the District of Alaska, wherein Ohlin H. Adsit, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice not be done to the parties in that behalf.

June 25th, 1902.

M. C. BROWN,

Judge United States District Court, for District of  
Alaska, Division No. 1.

Received copy of the within citation, June 25, 1902,  
and service admitted.

MALONY & COBB,  
Attorneys for Defendant in Error.

[Endorsed]: No. —. In the United States Circuit  
Court of Appeals, for the Ninth Circuit. Ohlin H. Adsit,  
Plaintiff in Error, vs. G. Kaufman, Defendant in Error.  
Citation. Filed June 26, 1902. W. J. Hills, Clerk.

United States of America, }  
District of Alaska. } ss.

Pleas and proceedings began and held in the District  
Court of the United States, for the District of Alaska,  
Division No. 1, at the November term, 1901. Present:  
the Honorable MELVILLE C. BROWN, Judge.

OHLIN H. ADSIT,  
vs.  
G. KAUFMAN,

Plaintiff, }  
Defendant. } No. 75A.

### Caption.

On May 13th, 1901, the plaintiff filed his complaint in  
said cause, which is in words and figures following, to  
wit:

*In the United States District Court for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

Plaintiff,

vs.

G. KAUFMAN,

Defendant.

### Complaint.

The plaintiff complains and alleges:

#### 1.

That plaintiff is the owner of an undivided one-half part or interest of, in, and to lot numbered four in block numbered four, with the improvements thereon, situated in the town of Juneau, Alaska, according to the official plat of said town made by G. W. Garside, U. S. Surveyor, and approved by the trustee of the townsite of said Juneau, Alaska, and was such owner during all the times hereinafter mentioned.

#### 2.

That on the 1st day of April, 1894, at the said town of Juneau, Alaska, and for some time thereafter, the defendant herein carried on a general dry goods and clothing business, in the building situated upon said lot No. 4, in said block No. 4, in said town, under the name of the "New York Store," also under the name and style of "Toklas & Kaufman," and thereafter the said defendant carried on and continued the said business at the same said place, under the name and style of "G. Kaufman & Sons."

## 3.

That the said defendant carried on the said business, as aforesaid, and for that purpose occupied the main store building situated upon said lot No. 4, in said block No. 4, in said town of Juneau, by permission of the plaintiff, from the 1st day of April, 1894, to the 1st day of July, 1896.

## 4.

That the use of the undivided one-half part or interest of the said premises for the said period was reasonably worth six hundred and fifty dollars (\$650.00).

## 5.

That the defendant has not paid the same, nor any part thereof, though plaintiff, about the time of the first occupancy of said premises by defendant, notified, and demanded of defendant to pay to this plaintiff the rent for said premises, occupied by him, as aforesaid, but the defendant occupied the said premises for the period of two years and two months, and during all of said period has persistently refused and failed, and still refuses and fails to pay plaintiff the said sum of \$650.00, or any part thereof, for the use and occupation of said premises, as aforesaid.

Wherefore plaintiff demands judgment against the said defendant, for the sum of six hundred and fifty dollars, together with interest thereon at the rate of eight per cent, per annum, from the 1st day of July, 1896, and for the costs of this action.

JOHN G. HEID,  
Attorney for Plaintiff.

United States of America, }  
District of Alaska. } ss.

O. H. Adsit, being first duly sworn says, I am the plaintiff named in the above-entitled action, that I have read the foregoing complaint, and know the contents thereof, that the same is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 11th day of May, A. D. 1901.

[Notarial Seal]

JOHN G. HEID,  
Notary Public for Alaska.

[Endorsed]: No. 75A. In the United States District Court, District of Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Complaint. Filed May 13, 1901. W. J. Hills, Clerk. J. G. Heid, Attorney for Plaintiff.

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*In the United States District Court for Alaska, Division No. 1, at Juneau.*

OHLIN H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff,

Defendant.

No. 75A.

**Answer.**

Now comes the defendant G. Kaufman, by his attorneys Maloney & Cobb, and demurs to so much of the plaintiff's complaint herein, as seeks to recover for rents for the period between the 1st day of April, 1884, and May 15th, 1895, and for grounds of demurrer say:

That this action for the rents specified has not been commenced within the time required by law, and a recovery thereof is barred by the statute of limitations in such cases made and provided, of which defendant prays judgment of the Court.

And for answer to the remaining portion of said complaint defendant alleges as follows:

1.

He admits that plaintiff is now the owner of an undivided one-half interest in said lot 4 in block 4, Juneau. but he denies that plaintiff was such owner at any time prior to the 1st day of July, 1896, and especially during the time between April 1st, 1894, and July 1st, 1896.

2.

He admits the allegations of paragraph 2 of said complaint.

3.

Referring to paragraph 3 of said complaint defendant specifically denies that he ever occupied said building by permission of plaintiff, or under him, or in recognition of any title of plaintiff herein; that during all the times defendant occupied said premises, he was occupying, using and paying rent therefor, under another person who was in possession and claiming title to the same adverse to any claim of plaintiff thereto.

4.

Defendant denies that the use of the undivided half part of said premises was worth the sum of \$650.00 or any greater amount than the sum of \$15.00 per month aggregating \$346.66 $\frac{2}{3}$ .



Wherefore defendant prays that he be discharged with his costs and disbursements herein incurred.

MALONY & COBB,  
Attorneys for Defendant.

United States of America, }  
District of Alaska. } ss.

J. F. Malony, being first duly sworn, deposes and says: I am one of defendant's attorneys in the above-mentioned action; I have heard read the foregoing answer, and know the contents thereof and the matters and things therein set out are true as I verily believe, and I make this verification because the facts are within my one knowledge, and the defendant is a nonresident of the District of Alaska.

J. F. MALONY.

Subscribed and sworn to before me this 18th day of July, 1901.

[Notarial Seal]

E. F. ROSE,  
Notary Public in and for Alaska.

Service of the above and foregoing answer is hereby admitted to have been duly and legally made in the District of Alaska, this 25th day of July, 1901.

JOHN G. HEID,  
Attorney for Plaintiff.

[Endorsed]: Original. No. 75A. In the United States District Court, for Alaska, Division No. 1, at Juneau. Ohlin H. Adsit, Plaintiff, vs. G. Kaufman, Defendant. Answer. Filed July 25, 1901. W. J. Hills, Clerk. Malony & Cobb, Attorneys for Defendant.

And afterwards, to wit, on the 1st day of October, 1901,  
the following proceedings were had and appear of  
record in said cause, to wit:

O. H. ADSIT	}	No. 75A.
vs.		
G. KAUFMAN		

**Order Overruling Demurrer.**

And now, on this day, this cause came on for hearing before the Court in chambers upon the demurrer of defendant to plaintiff's complaint herein, the plaintiff being represented by John G. Heid, the defendant by Malony & Cobb; and after argument had thereon, and the Court being fully advised in the premises, overrules said demurrer, and it appearing from the record in this case that the defendant had heretofore answered, the plaintiff is given ten days hereafter in which to reply; to which said ruling and order of the Court defendant by counsel excepts.

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*In the United States District Court, for the District of  
Alaska.*

OHLIN H. ADSIT,	}	No. 881.
vs.		
G. KAUFMAN,		
	Plaintiff,	
	Defendant.	

**Reply.**

The plaintiff replies to the answer of defendant:

1.

Denies that the defendant paid rent for said premises to another or other person who was in possession of the same, or occupied the said premises under said person, as in paragraph 3 of said answer alleged.

JOHN G. HEID,  
Attorney for Plaintiff.

United States of America, }  
District of Alaska. } ss.

Ohlin H. Adsit, being first duly sworn, says: I am the plaintiff in the above-entitled action; that I have read the foregoing reply and know the contents thereof; that the same is true, as I verily believe.

O. H. ADSIT.

Subscribed and sworn to before me this 8th day of November, 1901.

[Notarial Seal]

JOHN G. HEID.  
Notary Public for Alaska.

[Endorsed]: No. 75A. In United States District Court, District of Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Reply. Filed November 11, 1901. W. J. Hills, Clerk. J. G. Heid, Attorney for Plaintiff.

*In the United States District Court for Alaska, Division No. 1, at Juneau.*

O. H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff,

Defendant.

No. 75A.

**Motion to Strike Reply from the Files and to Enter Judgment on the Pleadings.**

Now comes the defendant and moves the Court to strike the reply of the plaintiff from the files herein and to render judgment on the complaint and answer, and for cause shows:

That on the 1st day of November, 1901, by order then made the plaintiff was required to file a reply in the days from and after said date; that no reply was filed within said time, nor was any extension of said time had or applied for; that on November 11th, 1901, the plaintiff without having served the same or obtained any leave of Court so to do, filed a reply in this cause, all of which is manifest from the record herein.

MALONY & COBB,  
Attorneys for Defendant.

Service of the above and foregoing motion is hereby admitted to have been duly and legally made in the District of Alaska, this 5th day of -----, 190—.

JOHN G. HEID,  
Attorney for Plaintiff.

[Endorsed]: Original. No. 75A. In the United States District Court for Alaska, Division No. 1, at Juneau. O. H. Adsit, Plaintiff, vs. G. Kaufman, Defendant. Motion to strike reply from the files and to enter judgment on the pleadings. Filed Dec. 5, 1901. W. J. Hills, Clerk. Maloney & Cobb, Attorneys for Defendant.

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And afterwards, to wit, on the 16th day of December, 1901, the following further proceedings were had and appear of record in said cause, to wit:

O. H. ADSIT  
vs.  
G. KAUFMAN. } No. 75A.

**Order Denying Motion to Strike, etc.**

Now, on this day, this cause came on to be heard upon the motion of the defendant to strike from the files the reply of plaintiff, filed herein, and for judgment as prayed for in the answer of the defendant, both parties being represented in court by their respective counsel; and after argument had, and the Court being fully advised in the premises, denies said motion, to which order and ruling of the Court defendant by counsel excepts.

*In the United States District Court, for the District of  
Alaska, Division No. 1.*

OHLIN H. ADSIT,	Plaintiff,	}	No. 75A.
vs.			
G. KAUFMAN,	Defendant.		

**Bill of Exceptions.**

Be it remembered that this case came on regularly for trial at Juneau, Alaska, on Tuesday, the 14th day of January, 1902, before the Honorable Melville C. Brown, District Judge for the said District, in Division No. 1, presiding, and a jury which was then and there duly impaneled and sworn; the plaintiff appearing by John G. Heid, and the defendant, by Maloney & Cobb; and upon the impaneling of the jury and after a statement of the case to the jury by counsel, on both sides, the following proceedings were had and taken:

*In the United States District Court, for the District of  
Alaska, Division No. 1.*

O. H. ADSIT,	Plaintiff,	}
vs.		
G. KAUFMAN,	Defendant.	

**Transcript of Testimony.**

By Mr. HEID.—The plaintiff now offers in evidence the findings of fact and judgment in the case of O. H.

Adsit vs. John F. Malony, found in Journal No. 6 of the records of the United States District Court for the District of Alaska, Division No. 1, at page 181.

The defendants object to the introduction of the findings of fact as immaterial and not binding on the defendants in this case, being between other and different parties. The judgment may be admissible, but the findings are objected to.

(Objection to the findings of fact sustained on the part: the same are not a part of the judgment. Exception.)

Whereupon Mr. Heid read said judgment in evidence as follows:

OLIN H. ADSIT,

vs.

JOHN F. MALONY,

Plaintiff,

No. 508.

Defendant.

Judgment.

This cause having been regularly called and tried by the Court, and the findings of fact and conclusions of law and the decision thereon in writing, having been duly rendered by the Court, which are now on file in this cause, wherein judgment is awarded in favor of Olin H. Adsit, plaintiff, against John F. Malony, defendant, and for costs, on motion of Johnson & Heid, plaintiff's attorneys,

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendant. for the

recovery of possession of an individual one-half interest of, in and to lot number four, in block number four, situated in the town of Juneau, Alaska, and as described in the complaint on file herein, and that the plaintiff have such judgment as aforesaid against the defendant and all persons claiming or to claim the same or any part thereof under or through the said defendant; and that the plaintiff be and he is hereby decreed to be the true and lawful owner of the land described in the complaint and hereinbefore mentioned;

And it is hereby further ordered, adjudged, and decreed that the plaintiff do have and recover his costs hereby taxed at \$                      against the defendant.

Dated August 10th, 1897.

By the Court.

ARTHUR K. DELANEY,

Judge.

Whereupon, O. H. ADSIT, the plaintiff, being first duly sworn, on his oath testified as follows, on

Direct Examination.

(By Mr HEID.)

Q. Mr. Adsit, are you the plaintiff in this action?

A. Yes, sir.

Q. I'll ask you to look at this paper and state what it is?

A. This is a deed from William J. Thompson, the party I bought the half interest of that property of, lot four, block four.

Q. How did you come to obtain that deed?



(Testimony of O. H. Adsit.)

A. I heard the property was for sale, and Mr. Hall, president of the Tacoma Grocery Co., made the purchase for me.

(Plaintiff now offers the deed in evidence.)

By the COURT.—Well, who is it executed by, in favor of whom, what consideration—it doesn't prove itself.

Q. By whom is the deed signed, Mr. Adsit?

A. William J. Thompson, and Ellen W. Thompson, his wife, and J. M. Brown, and Samuel St. Clair, as witnesses.

By the COURT.—Did you see them sign it?

A. No, sir, I didn't.

Q. Do you know the handwriting of those people?

A. No, sir; it came that way through the mail.

Q. And the only way you know it was signed and delivered is from the way it appears on that paper?

A. Yes, sir; Mr. Hall was president of the Tacoma Grocery Company, and I was working for it at the time, and he made this purchase from the West Coast Grocery Company.

(By Mr. COBE.)

Q. You mean that you were informed by him that was so?      A. Yes, sir.

Q. Then you only know it by hearsay?

By Mr. HEID.—I now renew my offer of the deed.

(Objected to by counsel for defendants, as not proved so as to be competent evidence. It is not properly acknowledged, appearing to have been acknowledged in some county clerk's office not known to the laws of

(Testimony of O. H. Adsit.)

Alaska. It appears to have been acknowledged by J. M. Brown, clerk of the Superior Court somewhere, which doesn't appear except by the seal.)

By the COURT.—Evidently this paper was acknowledged by someone in Washington, where they have a Superior Court, and the officer's seal seems to indicate that it was the Superior Court of Yakima County. There was never such a county in Alaska, and no such officer to acknowledge it. The paper as it now stands is not entitled to be received in evidence. If the signatures of the parties can be proved without reference to any acknowledgment, it would be a good common-law contract, but Mr. Adsit doesn't seem to know anything about their signatures, or anything else. The Court refuses to allow this to go in evidence on the proof so far made.

(Exception.)

By Mr. HEID.—Plaintiff now offers in evidence the complaint in the action No. 508 in the United States District Court for Alaska, entitled O. H. Adsit vs. John F. Malony, being the complaint on which the judgment heretofore introduced is based.

(Objected to as irrelevant, incompetent and immaterial. The judgment shows on its face what was in controversy.)

By the COURT.—In this complaint the plaintiff says that he has been, and now is, entitled to the possession and right of possession, and seeks to recover possession. The evidence proper to be admitted, if anything at all is

(Testimony of O. H. Adsit.)

proper, would be what would constitute a judgment-roll; that would be the complaint, answer, reply if there was one, and the judgment entered. The statute enumerates just what shall constitute a judgment-roll, and whatever that is, would of course be competent evidence. This complaint is therefore admitted in evidence.

(Exception by defendants.)

(Said complaint is as follows:)

**Plaintiff's Exhibit "A."**

*In the United States District Court for the District of Alaska,*

OHLIN H. ADSIT,

Plaintiff,

vs.

JOHN F. MALONY,

Defendant.

**Complaint.**

The plaintiff complains and alleges:

**I.**

That on the 29th day of April, 1891, and for more than nine years prior thereto, the plaintiff and his grantors have been the owners by right of prior occupancy and actual possession, and have at all times mentioned herein been the owners, and plaintiff now is the owner by reason of such prior occupation and possession of an undivided one-half part interest of, in, and to that certain piece or parcel of land, the same being fifty feet in width by one hundred feet in length, situated on the corner of

(Testimony of O. H. Adsit.)

Second and Franklin streets in the town of Juneau, District of Alaska, better described as lot numbered four (4) in block numbered four (4) according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, and that plaintiff is entitled to the possession thereof. That one James Winn is the owner of the other undivided one-half part interest of, in and to said described premises.

## II.

That while plaintiff and his grantors were so possessed the defendant and his grantor, on or about the 29th day of April, 1891, without right or title so to do, entered thereon and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld, and still wrongfully withholds the possession thereof from him, the said plaintiff.

Wherefore, the plaintiff prays judgment against the defendant: 1. For the recovery of the possession of an undivided one-half part or interest of, in and to the whole of said described premises; 2. For plaintiff's costs and disbursements in said action.

JOHNSON & HEID,  
Plaintiff's Attorneys.

The United States, }  
District of Alaska. } ss.

Ohlin H. Adsit, being first duly sworn, says: I am the plaintiff named in the foregoing entitled action; that I

(Testimony of O. H. Adsit.)

have read the foregoing complaint and know the contents thereof; that the said complaint is true as I verily believe.

OHLIN H. ADSIT.

Subscribed and sworn to before me this 22d day of May, 1896.

F. D. KELSEY. [L. S.]

Notary Public for Alaska.

[Endorsed]: No. 508. In United States District Court, District of Alaska. Plaintiff's Exhibit "A," 75A. Plaintiff's Exhibit "E," retrial. O. H. Adsit vs. Jno. F. Malony. Complaint. Filed May 25, 1896. Charles D. Rogers, Clerk. Johnson & Heid, Attorneys for Plaintiff. 2-259.

By Mr. HEID.—I now offer this judgment, or writ of possession in evidence in said Case No. 508 of this court.

(No objection.)

By the COURT.—I am not clear that this writ of possession is a part of the judgment-roll, but if there is no objection it may go in. You better also offer whatever comprises the judgment-roll—answer, reply and other pleadings.

By Mr. HEID.—I also offer the amended answer in that same case, the reply and the writ of possession.

(No objection.)

(Which said exhibits are as follows:)

(Testimony of O. H. Adsit.)

Plaintiff's Exhibit "E."

*In the United States District Court, for the District of  
Alaska.*

OHLIN H. ADSIT,

Plaintiff,

vs.

JOHN F. MALONY,

Defendant.

No. 508.

Writ of Possession.

The President of the United States to the United States  
Marshal, for the District of Alaska, Greeting:

Whereas, on the 20th day of August, 1897, Ohlin H. Adsit, the plaintiff, recovered a judgment in the said United States District Court, for the District of Alaska, against John F. Malony, defendant, for the possession of certain premises in said judgment and decree hereinafter more particularly described, and also for the sum of \$———, costs and disbursements, as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said Court, at Sitka, in said District of Alaska, and the said judgment was docketed in said clerk's office, in said District, on the day and year first above written.

Now, therefore, you, the said marshal, are hereby commanded and required to place the said Ohlin H. Adsit

(Testimony of O. H. Adsit.)

in the quiet and peaceable possession of the lands and premises in said judgment and decree, described as follows, to wit: An undivided one-half part or interest of, in, and to lot No. 4 in block No. 4, situated in the town of Juneau, Alaska, according to the plat and survey of said town of Juneau, made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau.

Witness, Honorable CHARLES S. JOHNSON, Judge of said United States District Court, for the District of Alaska, at the courthouse in the town of Sitka, in said District, and the seal of said Court this 20th day of September, 1897.

[Seal]

ALBERT D. ELLIOT,

Clerk.

[Endorsed]: No. 508. In United States District Court, District of Alaska. Plaintiff's Exhibit "B," retrial. Ohlin H. Adsit vs. John F. Malony. Writ of Possession. Returned and filed October 12th, 1897. Albert D. Elliot, Clerk. United States, District of Alaska—ss. I hereby certify that I received the within writ of possession on the 20th day of September, 1897, and that on the 21st day of September, 1897, I served the same by placing the within named Olin H. Adsit in the peaceable and quiet possession of the within described premises personally at Juneau, Alaska. James M. Shoup,

(Testimony of O. H. Adsit.)

U. S. Marshal. By William M. Hale. Plf. Ex. "E," 75A.  
 Marshal's fee, 75c. Paid by O. H. Adsit.

**Plaintiff's Exhibit "C."**

*In the United States District Court, in and for the District  
 of Alaska.*

OHLIN H. ADSIT,

vs.

JOHN F. MALONY.

Plaintiff,

Defendant.)

**Amended Answer.**

Leave of Court being first had and obtained, for answer to the complaint in the above-entitled action, the defendant answering says:

1st. That he denies that on the 29th day of April, 1891, or at any other time, or at all, or that for more than nine years prior thereto, that the plaintiff and his grantors have been the owners by right of prior occupancy, and actual possession, or have at any time been the owners of the premises hereinafter described, or that the plaintiff is now the owner, or ever was such owner by reason of prior occupancy and possession, or by any other reason whatever, of an undivided one-half part or interest of, in, and to lot number four (4), in block number four (4), in the town of Juneau, and denies that the plaintiff is entitled to the possession thereof.



(Testimony of O. H. Adsit.)

Admits that one James Winn is the owner of an undivided one-half interest in the above-described premises.

Denies that on the 29th day of April, 1891, or at any other time or at all, did the defendant or his grantors, without right or title enter upon said premises and oust and eject the plaintiff and his grantors therefrom, or that they have from said time, or at all, wrongfully withheld or withholds the possession from the plaintiff.

## SECOND.

For his second defense and answer, and by way of new matter the defendant alleges:

### 1st.

That on or about the 24th day of November, 1891, one Alfred G. Gamel was in the quiet and peaceable possession and occupancy of an undivided one-half interest of lot number four (4), in block number four (4), according to the plat and survey of the town of Juneau, made by one G. C. Hanus, accepted and adopted in the year 1881 by the citizens of the town formerly known as Rockwell, but now as Juneau, Alaska.

### 2d.

That on or about the 20th day of January, 1894, the said Alfred H. Gamel conveyed and transferred to this defendant all his right, title, and interest in and to the said lot and the buildings and premises thereon situated, and thereupon the said Gamel delivered the possession of said lot and premises to this defendant.

(Testimony of O. H. Adsit.)

3d.

That ever since said time this defendant by himself and his tenants have been in the quiet and peaceable possession and occupancy of said lot and premises, and now is in the quiet and peaceable possession of the same.

4th.

That a period of more than three years has elapsed since this defendant and his grantors have been in the quiet and peaceable possession of said lot and premises, and that the said defendant's estate and interest in said premises has not expired or ended, and that by reason thereof the plaintiff ought not now be allowed to maintain his said action.

Wherefore, the defendant prays judgment that the plaintiff take nothing by his said suit, and that he be discharged without day, and that he recover his costs and disbursements.

JNO. TRUMBULL,  
Attorney for Defendant.

United States, }  
District of Alaska. } ss.

J. F. Malony, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the above and foregoing amended answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are

(Testimony of O. H. Adsit.)

therein stated on information or belief, and as to those matters that he believes it to be true.

(Signed) J. F. MALONY.

Subscribed and sworn to before me this 8th day of December, 1896.

[Seal]

CHARLES D. ROGERS,

Clerk.

By Walton D. McNair,

Deputy.

[Endorsed]: Plaintiff's Exhibit "C," 75A. No. 508. Original. United States District Court for the District of Alaska. Ohlin H. Adsit, Plaintiff, vs. John F. Malony, Defendant. Amended Answer. Service of the within amended answer admitted by copy this 8th day of December, 1896. Johnson & Heid, Attorneys for Plaintiff. Filed December 8, 1896. Charles D. Rogers, Clerk. Walton D. McNair, Deputy Clerk. John Trumbull, Attorney for Defendant.

(Testimony of O. H. Adsit.)

**Plaintiff's Exhibit "B."**

*In the United States District Court, for the District of  
Alaska.*

OHLIN H. ADSIT,

vs.

JOHN F. MALONY.

Plaintiff,

Defendant.

**Reply.**

The plaintiff replies to the answer of defendant, and referring to the second defense, denies each and every allegation therein contained, and denies that on or about the 24th day of November, 1891, or any other time, or at all, one Alfred H. Gamel was in the quiet and peaceable possession, or possession at all, and occupancy of an undivided one-half interest, or any interest, of lot numbered four in block numbered four, in the town of Juneau, Alaska, as described in defendant's second defense.

**2.**

Denies that on or about the 20th day of January, 1894, or at any other time, the said Alfred H. Gamel conveyed and transferred to the defendant all his right, title, and interest, or that the said Gamel had any right, title, or interest to convey, in and to said lot and the buildings therein situated, and that the said Gamel delivered the possession of the said lot to the defendant.

(Testimony of O. H. Adsit.)

3.

Denies that ever since the time mentioned in defendant's second defense, the defendant by himself and his tenants have been in the quiet and peaceable possession and occupancy of said lot and premises, and that he now is in the quiet and peaceable possession of the same.

Wherefore, plaintiff demands judgment against the defendant as prayed for in the complaint herein.

CHAS. E. PATTERSON and  
JOHNSON & HEID,

Attorneys for Plaintiff.

To this answer, we replied as follows:

The United States, }  
District of Alaska. } ss.

O. H. Adsit, being first duly sworn says: I am the plaintiff named in the foregoing entitled action; that I have heard read the foregoing reply and know the contents thereof; that the same is true, as I verily believe.

(Signed) O. H. ADSIT.

Subscribed and sworn to before me this 12th day of November, 1896.

CHARLES D. ROGERS,  
Clerk.

By Walton D. McNair,  
Deputy Clerk.

(Testimony of O. H. Adsit.)

Service with copy this day accepted at Juneau, Alaska, this December 12, 1896.

JOHN TRUMBULL,  
Attorney for Defendant.

[Endorsed]: No. ——. In United States District Court, District of Alaska. O. H. Adsit vs. J. F. Malony. Reply. Filed December 12th, 1896. Charles D. Rogers, Clerk. C. E. Patterson and Johnson & Heid, Attorneys for Plaintiff. Plaintiff's Exhibit "G," retrial. Plaintiff's Exhibit "B," 75A.

By The COURT.—Mr. Heid, you may as well read the findings in evidence. The defendants may have an exception; but it might as well all go in.

By Mr. HEID.—Very well, your Honor. Gentlemen of the Jury, the findings in this former case, No. 508, were as follows:

**Plaintiff's Exhibit "D."**

*In the United States District Court, for the District of Alaska.*

OHLIN H. ADSIT,

Plaintiff,

vs.

JOHN F. MALONY,

Defendant.

No. 508.

**Findings.**

This cause having been regularly called for trial before the Court—a jury trial having been expressly

(Testimony of O. H. Adsit.)

waived by stipulation in open court of the respective parties appearing herein—Johnson & Heid appeared as attorneys for the plaintiff, and John F. Malony, the defendant herein, appeared in proper person. And the Court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the Court for its decision, the Court now finds the following facts:

I. That on the 19th day of April, 1881, the plaintiff and his grantors entered into actual possession of all that certain lot, piece, or parcel of land, described in the complaint as lot numbered four (4) in block numbered four (4), in the town of Juneau, District of Alaska, according to the plat and survey of said town of Juneau made by one G. C. Hanus, accepted and adopted in the year 1881, by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska, said lot being situated on the corner of Second and Franklin streets, in said town of Juneau, claiming said lot, piece, or parcel of land in their own right; and the said plaintiff and his grantors, have ever since the date last aforesaid, occupied, used, and possessed said lot or piece or parcel of land, having erected a substantial frame or wooden building or structure thereon, using and claiming the same, in their own right, from that date to the present time, adversely to all the world, and especially against the defendant.

II. That the plaintiff is the owner of an undivided

(Testimony of O. H. Adsit.)

one-half ( $\frac{1}{2}$ ) part or interest of, in and to said lot No. 4 in said block No. 4, hereinbefore described, and that the whole of said lot, piece, or parcel of land in the complaint described lies within the said town of Juneau, Alaska.

III. That on or about the 29th day of April, 1891, the defendant, without right or title so to do, entered on and upon said described lot, piece, or parcel of land in the complaint described, and ousted and ejected the plaintiff and his grantors therefrom, and from thence hitherto has wrongfully withheld the possession thereof from the said plaintiff.

As conclusions of law from the foregoing facts, the Court now hereby finds and decides:

1. That the plaintiff is the owner and entitled to the possession of an undivided one-half part or interest of, in and to the said lot, piece, or parcel of land as the same is described in the complaint on file herein, as against the defendant, and all persons claiming or to claim the same, or any part of said right or interest of the plaintiff in and to said lot, piece or parcel of land, under him, the said defendant, and that the defendant has no right, title or interest in or to said land, or any part thereof.

2. That the plaintiff is entitled to a judgment as prayed for in his complaint for the recovery of the possession of an undivided one-half part or interest of, in and to said lot No. 4 in said block No. 4, in said town of Juneau, against said defendant and all persons claiming



(Testimony of O. H. Adsit.)

or to claim the same, or any part thereof, under or through the said defendant.

3. That the plaintiff is entitled to a judgment for costs, to be taxed herein against the defendant.

And judgment is hereby ordered to be entered accordingly.

Dated August 10, 1897.

By the Court.

ARTHUR K. DELANEY,  
Judge.

[Endorsed]: No. 508. In the United States District Court, District of Alaska, Plaintiff's Exhibit "C," Retrial—Plaintiff's Exhibit "D," 75A. Ohlin H. Adsit vs. John F. Malony. Findings. Filed August 20, 1897. Charles D. Rogers, Clerk.

Examination of Mr. ADSIT (Continued).

(By Mr. HEID.)

Q. Mr. Adsit, do you know the defendant G. Kaufman?      A. Yes, sir.

Q. Do you know whether he carried on a business in the town of Juneau in the building situated on lot four in block four as mentioned in the complaint herein?

A. Well, that's a hard one; I don't know whether it's G. Kaufman or G. Kaufman and Sons.

Q. Well, at any time since you acquired an interest in the building on lot four in block four, has anyone carried on business there at all?

A. Yes, sir; by Mr. Kaufman.

(Testimony of O. H. Adsit.)

Q. Under what name or names was the business carried on?

A. The New York Store; G. Kaufman; Toklas & Kaufman, and G. Kaufman and Sons.

Q. How long, if you know, did they occupy that building for the purposes of carrying on that business?

A. About twenty-six months.

Q. What kind of business did they carry on there?

A. Dry goods and clothing.

Q. Can you state the date they carried on this business from?

A. I think they went in there some time in April, 1894, and was there a little over two years—twenty-six months in all.

Q. Did they ever pay you any rent for the use and occupation of that building?

A. No, sir; not one cent.

Q. Did you ever demand payment of them of that rent?

A. I did; if I remember rightly you served the notice on them.

Q. What was the rental value of that property at the time they went in and during the time they occupied the same?

A. About fifty dollars a month.

By the COURT.—That is, for the whole property?

A. Yes, sir; it rented at—

(Counsel for defendants object on the ground that the witness has not qualified to state rental values.)

(Objection overruled. Exception.)

(Testimony of O. H. Adsit.)

A. Well, I rented it for seventy-five dollars after they went out of it, Mr. Cobb.

By Mr. COBB.—I am addressing my objection to the Court, Mr. Adsit, not to you.

By the COURT.—Mr. Cobb, your objection came too late—that is all.

By Mr. COBB.—Then I move that the answer to stricken out on the ground that the witness has not qualified to testify as to values.

By the COURT.—The witness may be examined as to his qualifications in that respect.

(By Mr. HEID.)

Q. How long have you been a resident of Juneau, Mr. Adsit?

A. About eleven years the 20th of March.

Q. Are you familiar with the location of the different business houses in the town of Juneau?

A. Yes, sir.

Q. You know where this building is situated?

A. I do, sir.

Q. On lot four in block four?           A. Yes, sir.

Q. On what street?

A. The corner of Second and Franklin streets.

Q. Are you familiar with the prices paid for rent in the town of Juneau during the time the Kaufman's were in possession of this property? Business houses?

A. I am sir.

Q. What would you say the rental value would be, or

(Testimony of O. H. Adsit.)

was at the time and during the time the defendants occupied this building, situated on lot four in block four in the town of Juneau?

A. I would say it was worth at least fifty dollars a month.

Q. And how much are you suing for?

(Objected to as not the best evidence—the complaint shows that.)

(Objection sustained. Exception.)

By Mr. HEID.—Well, we're suing for half of the rental value anyhow. How much is due you Mr. Adsit from the defendants, as rent? For the use and occupation of that building, as mentioned in the complaint?

(Objected as calling for a conclusion of the witness.)

By the COURT.—It's a matter of computation. He has stated the price and the number of months they occupied the building.

Q. Has the defendant ever paid you anything for the use and occupation of those premises, in the way of rent or otherwise?      A. No, sir; not a cent.

Q. And that rent as you state, whatever it may amount to, is still due you from the defendants?

A. Yes, sir.

#### Cross-Examination.

(By Mr. COBB.)

Q. Why didn't you put them out?

A. Put who out?

Q. These people you claim were occupying your prem-

(Testimony of O. H. Adsit.)

ises; if they wouldn't pay their rent, why didn't you put them out?

A. Well, the case was in court, and Mr. Malony being in possession—

Q. They rented from Mr. Malony, didn't they?

A. I think so.

Q. Well, you never rented to them?

A. Not in a sense—

Q. And you never received rent from them?

A. No; but we notified them not to pay it to Malony as I was half owner there.

Q. Did they come to you to get permission to go in there?      A. No, sir.

Q. They got possession from Malony, didn't they?

A. Yes, sir.

Q. And you knew that?      A. Yes, sir.

Q. And the case of Mr. Malony wasn't settled until in 1897?      A. 1896 or 1897, I believe.

Q. The first time you had possession of the property was when you took possession under the writ of possession in 1897?      A. Yes, sir; I think so.

By Mr. HEID.—I will now have to take the stand and testify that I delivered this ontice to the defendants, Mr. Cobb, unless you will admit that it was delivered.

By Mr. COBB.—My objection is that it is irrelevant and immaterial, and if the Court overrules that objection, we will then admit that it was delivered.

By the COURT.—I will admit it for what it is worth.

I am not sure that it is relevant or material, but it may go in.

By Mr. HEID.—Gentlemen of the Jury, the notice which I served, as is admitted by the defendants, reads as follows:

**Plaintiff's Exhibit "G."**

Duplicate Original. Juneau, Alaska, April 23d, 1894.

(Plaintiff's Exhibit "J," *Adsit vs. Kaufman Bros.—Retrial.*)

Messrs. Toklas & Kaufman, Juneau, Alaska.

You are hereby notified that O. H. Adsit, Esq., of Juneau, Alaska, is the owner of an undivided one-half part or interest of, in, and to lot numbered four (4) in block numbered four (4), in the town of Juneau, Alaska, being the premises now occupied by you under the business name of "The New York Store"; and you are hereby requested to pay to said Mr. O. H. Adsit, the one-half of all the rent due from you for said premises and the occupation thereof by you, and to pay such rent to no one excepting to the said Mr. Adsit, unless upon the written order signed by said Mr. Adsit.

Very respectfully,

JOHN G. HEID,

Attorney for O. H. Adsit.

I will now have this marked Plaintiff's Exhibit "G," in case No. 75A.

(So marked.)

By Mr. HEID.—Now, if the Court please, I offer in evidence receipts and papers to show defendants were in possession during the time mentioned, of this property of Mr. Adsit's, and I will also take the stand on that point if necessary.

By Mr. COBB.—My impression is we admit in the answer that we were in the possession of that building during the time mentioned. I don't think we denied it, because we couldn't.

Plaintiff rests.

By Mr. COBB.—Defendants now move the Court to instruct the jury to return a verdict in favor of the defendants, on the ground that the evidence conclusively shows that the defendants occupied the premises in controversy under another holding adversely to the plaintiff, and not by permission of the plaintiff; and that the relation of landlord and tenant never existed between plaintiff and defendants either by express or implied contract.

After argument by counsel at length,

The COURT said:

A tenant is one who occupies the lauds or premises of another in subordination to that other's wish, and with his assent either express or implied; but in order to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, per se, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title, but without his assent, he is a

mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

Where a person goes into possession wrongfully, it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of trespasser to that of a tenant. In such a case, the contract must be explicit, and embrace all the elements previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of trespasser to that of a tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these



parties to continue in the occupation of his premises, provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it; if there must be the assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery. (Court was here interrupted by counsel.)

Now, Mr. Heid, the only question in my mind is this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. You may, under proper circumstances, waive the tort—the wrongful taking or detention of the premises—and sue on an implied contract. For example, if a man steals my horse, I need not pursue him in tort. I may waive the tort and sue for the value of the horse upon an implied promise on the part of the thief to pay for what he takes from me. That is the only theory upon which this action could be maintained in the condition it now is.

When this case was up before, my curiosity was somewhat excited because the very defense that is now presented here was not presented in that action. It seemed to me then, that the action could not be maintained in

the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages were not alleged. I simply say that on the face of this judgment, there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

And despite the fact as it appears from the evidence, that Mr. Adsit hasn't been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

Gentlemen of the Jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendants; and I do this on the theory

that in the action as brought, and under the facts as proved, the plaintiff has on right to a recovery. You may select one of your number as foreman—I will select Mr. Rose, as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendants.

(To which instruction, in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

I hereby certify the foregoing twenty-four pages of typewritten matter constitute a true transcript of the testimony and proceedings at the trial of said cause.

\_\_\_\_\_,  
Reporter.

Dated at Skaguay, Alaska, April 18, 1902.

FEEES.

- 1. Original copy.... \$18.00
- 2. Duplicates.... 7.20

O. H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff, )  
 )  
 No. 75A.  
 )  
 Defendant. )

Verdict.

We, the jury, selected, impaneled, and sworn in the above-entitled cause, find for the defendant.

A. M. ROSS,  
Foreman

To all of which plaintiff by counsel excepts. Whereupon the jury was excused from further consideration of this cause.

*In the United States District Court, for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

Plaintiff,

vs.

G. KAUFMAN,

Defendant.

No. 75A.

**Motion for New Trial.**

(January 17, 1902.)

Comes now the plaintiff in the above-entitled action, by his attorney, John G. Heid, and moves the Court for a new trial of the above-entitled action; this motion is based upon the facts that in the trial of the above cause, errors in law, which were excepted to by plaintiff, were made by the Court, as follows:

1. In ruling out and refusing to admit in evidence the deed from William J. Thompson and wife to O. H. Adsit, the plaintiff herein, conveying to said Adsit his interest of, in, and to the premises occupied by said defendant.

2. The Court erred further in refusing to submit the case to the jury.

3. The Court further erred in peremptorily instructing the jury to return a verdict for the defendant.

4. In ruling that the plaintiff cannot recover of and from the defendant for the use and occupation of the

premises by said defendant, and described in the complaint herein.

JOHN G. HEID,  
Attorney for Plaintiff.

Thereafter, to wit, on the 3d day of February, 1902, the Court made the following order:

O. H. ADSIT  
vs.  
G. KAUFMAN, } No. 75A.

**Order Overruling Motion for New Trial.**

On this day this cause coming on to be heard on motion of plaintiff for a new trial herein, and the Court being fully advised in the premises, overrules said motion of plaintiff, to which order and ruling of the Court plaintiff by counsel excepts.

And on the same day, to wit, the said 3d day of February, 1902, the Court rendered and entered its judgment herein, as follows:

OHLIN H. ADSIT,  
vs.  
G. KAUFMAN, } Plaintiff,  
Defendant. } No. 75A.

**Judgment.**

On this 3d day of February, 1902, this cause came on to be heard upon the motion of the plaintiff to set aside the verdict of the jury herein, and to grant him a new

trial; Mr. John G. Heid, appearing for said motion, and Messrs, Maloney & Cobb, contra, and the Court, having heard said motion, and the argument of counsel, and being fully advised in the premises, is of the opinion that the law is for the defendant.

It is therefore considered by the Court, and it is so ordered and adjudged, that said motion be, and the same is hereby in all things overruled and denied, to which ruling of the Court the plaintiff then and there excepted.

Upon motion of Messrs. Maloney & Cobb for judgment upon the verdict for the defendant herein—

It is considered by the Court, and so ordered and adjudged, that the plaintiff, Ohlin H. Adsit, take nothing by his action herein; that the defendant, G. Kaufman, go hence without day, and that he have and recover of and from the plaintiff, Ohlin H. Adsit, all costs in this behalf incurred, to be taxed by the clerk, for which let execution issue.

**For Identification, Plaintiff's Exhibit No. 1 (Ruled Out).**

Know all men by these presents, that we, William J. Thompson, and Ellen W. Thompson, wife of said Wm. J. Thompson, both of the city of Tacoma, Washington, in consideration of five dollars, to us paid by Ohlin H. Adsit, of the town of Juneau, District of Alaska, do hereby grant, bargain, sell, remise, release and forever quitclaim unto the said Ohlin H. Adsit, and unto his heirs and assigns all of our right, title and interest in and to the following described parcel of land, situate in the said town of Juneau, and District of Alaska, to wit: An undivided one-half ( $\frac{1}{2}$ ) part or interest of, in, and to

lot numbered four (4), in block numbered four (4), as per plat and survey of said town made by G. C. Hanus, accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska; together with an undivided one-half part or interest of, in, and to all buildings and improvements thereon situated and erected.

To have and to hold the same, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining unto said Ohlin H. Adsit, and unto his heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [Seal]

ELLEN W. THOMPSON. [Seal]

Signed, sealed and delivered in presence of:

J. M. BROWN,

DANIEL SINCLAIR.

United States, }  
District of Alaska. } ss.

This certifies, that on this 24th day of March, A. D. 1894, before me, the undersigned, a county clerk, in and for the said District, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes herein mentioned.

And that Ellen W. Thompson, wife of said William J. Thompson, on examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily, and without fear, coercion or compulsion from anyone.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal of Superior Court]                      J. M. BROWN,  
County Clerk and Clerk of the Superior Court.

The foregoing bill of exceptions is correct, and it is hereby agreed that same may constitute a part of the record and be certified to the Circuit Court of Appeals of the United States for the Ninth Circuit, and there be used as a bill of exceptions in this case.

JOHN G. HEID,  
Attorney for Plaintiff.

MALONY & COBB,  
Attorneys for Defendant.

The foregoing bill of exceptions is hereby settled, approved, and allowed, and ordered to be made part of the record in this cause.

MELVILLE C. BROWN,  
Judge.

[Endorsed]: In United States District Court, for Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Bill of Exceptions. Presented this 28th April, A. D. 1902. M. C. Brown, Judge. Filed May 8, 1902. W. J. Hills, Clerk.



*In the United States District Court, for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

vs.

G. KAUFMAN,

Plaintiff,

Defendant.

No. 75A.

**Assignment of Errors.**

And now, to wit, on the 25th day of June, 1902, comes the said plaintiff, Ohlin H. Adsit, by John G. Heid, his attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error in this:

1.

That the United States District Court, for the District of Alaska, Division No. 1, before which said matter was tried, erred in ruling out and refusing to admit in evidence the deed from William J. Thompson and Ellen W. Thompson, his wife, to said Ohlin H. Adsit, the plaintiff herein, conveying to said plaintiff, Ohlin H. Adsit, an undivided one-half part or interest of, in, and to lot numbered four (4), in block numbered four (4), in the town of Juneau, Alaska, together with all improvements thereon; being the premises occupied by the defendant, G. Kaufman, herein, and which said deed was executed and delivered by said Thompson and wife, to said plaintiff, Ohlin H. Adsit, as is set forth in the bill of excep-

tions, approved, settled herein by the Court, and which said deed is as follows:

“Know all men by these presents, that we, William J. Thompson, and Ellen W. Thompson, both of the city of Tacoma, Washington, in consideration of five dollars, to us paid by Ohlin H. Adsit, of the town of Juneau, District of Alaska, do hereby grant, bargain, sell, remise, release and forever quitclaim unto the said Ohlin H. Adsit and unto his heirs and assigns all our right, title and interest in and to the following described parcel of land, situate in the said town of Juneau, and District of Alaska, to wit: An undivided one-half ( $\frac{1}{2}$ ) part or interest of, in and to lot numbered four (4), in block numbered four (4), as per plat and survey of said town made by G. C. Hanus, accepted and adopted by the citizens of the town formerly known as Rockwell, but now Juneau, Alaska. Together with an undivided one-half part or interest, of, in, and to all buildings and improvements thereon situated and erected.

To have and to hold the same, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, unto said Ohlin H. Adsit, and unto his heirs and assigns forever.

In witness whereof, we have hereunto set our hands and seals this 24th day of March, A. D. 1894.

WILLIAM J. THOMPSON. [Seal]

ELLEN W. THOMPSON. [Seal]

Signed, sealed and delivered in presence of:

J. M. BROWN,

DANIEL SINCLAIR.

United States, }  
District of Alaska. } ss.

This certifies, that on this 24th day of March, A. D. 1894, before me, the undersigned, a county clerk, in and for the said District, personally appeared the within-named William J. Thompson and Ellen W. Thompson, his wife, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes herein mentioned.

And that Ellen W. Thompson, wife of said William J. Thompson, on examination made by me separate and apart from her said husband, acknowledged to me that she executed the same freely and voluntarily and without fear, coercion, or compulsion from anyone.

In testimony whereof, I have hereunto set my hand and seal the day and year last above written.

[Seal of Superior Court]                      J. M. BROWN,  
County Clerk and Clerk of the Superior Court."

2.

That the United States District Court, for Alaska, Division No. 1, erred in the opinion and decision given in the presence of the jury upon the defendant's motion to direct a verdict in favor of the defendant, as is set forth in said bill of exceptions, as follows:

"A tenant is one who occupies the lands or premises of another in subordination to that other's wish, and with his assent, either express or implied; but in order

to create the relation, those two elements must concur. The fact that one is in the possession of lands or premises of another does not, *per se*, establish a tenancy; because, if he is in possession under claim of title in himself, or under the claim of title in another, or even in recognition of the owner's title but without his assent, he is a mere trespasser and cannot be compelled to yield rent for his occupancy, nor is he estopped from attacking the owner's title. In such case, the elements requisite to create the relation of landlord on the one hand and tenant on the other are lacking, to wit, assent on the one hand and subordination of title on the other. If the owner gives his assent to the occupancy of anyone, and that other enters upon it and claims adversely, a tenancy is not thereby created. In order to have that result, the person in possession must accept such premises and consent to hold under the owner and in subordination to the owner's title.

“Where a person goes into possession wrongfully, it is undoubtedly competent for the party, by contract subsequently made, to change the relation from that of a trespasser to that of tenant. In such a case, the contract must be explicit, and embrace all the elements previously referred to. And if it is intended to have the tenancy relate back to the original entry, so as to change the tenant's occupancy from that of a trespasser to that of a tenant, to maintain an action in rent the contract should embrace the full period of occupancy, or neither the character of the prior occupancy nor the residence will be changed.

“Taking your notice to these parties to the effect that they were occupying your premises and your demand for them to pay you, that would be simply a consent on your part that they might occupy your premises by paying a reasonable rental therefor, and you warn them not to pay anybody else. The notice shows the intention of Mr. Adsit; that is, that he was willing to allow these parties to continue in the occupation of his premises provided they should pay the rent to him and no one else. Now, if the Supreme Court of Nevada is right about it; if there must be assent to such a proposition by the party occupying the premises, and a consent to occupy the premises as a tenant, there is an implied contract between the parties that the tenant will pay either an agreed or reasonable rental for the premises. The notice in that case would simply strengthen the position of the other party, and would tend to defeat your recovery.

“Now, Mr. Heid, the only question in my mind is this: If these parties were occupying your premises, whether you would have the right to waive the tort and sue as on contract for the money—that is, sue on the implied contract—and whether this suit could be pursued and a recovery had on that theory. If it can't be had on that theory, it can't be had at all. There is no doubt in my mind as to that. That you may, under proper circumstances, waive the tort, the wrongful taking or detention of the premises, and sue on an implied contract: For example, if a man steals my horse I need not pursue him in tort. I may waive the tort and sue for the value of the horse on an implied promise on the part of

the thief to pay for what he takes from me. That is the only theory upon which this could be maintained in the condition it now is.

“When this case was up before, my curiosity was somewhat excited, because the very defense that is now presented here was not presented in that action. It seemed to me then that the action could be maintained in the form in which it was brought before, considering the circumstances of the case; and under the authorities presented, it seems very clear this action cannot be maintained under the facts as they are presented in the present case, and the pleadings as they stand. Another thing that has excited my curiosity somewhat, is the fact that a judgment is presented in evidence here against Mr. Malony, showing title in the plaintiff; and while in that judgment the Court finds that Mr. Malony had occupied these premises wrongfully for a number of years, and that the plaintiff was entitled to the possession of the property at all times, yet not a dollar of damages is asked for that wrongful detention. The presumption that would naturally follow is, that the rent might be offset by improvements and betterments that have been made upon the property in the meantime, against the damages that arose from the wrongful detention. I don't know that such is the case. There may be other reasons why damages are not alleged. I simply say that on the face of this judgment, there is a natural presumption arising that there is a reason why damages were not alleged, and the natural reason would be the offset of improvements and betterments against the damages that might be recovered.

“And despite the fact as it appears from the evidence, that Mr. Adsit hasn’t been paid a cent of rent for these premises, and the reluctance with which I give this instruction, I can see my way to no other conclusion.

“Gentlemen of the jury: Under the law, I feel it incumbent upon me to instruct you at this time to return a verdict for the defendant, and I do this on the theory that in the action as brought and under the facts as proved, the plaintiff has no right to a recovery. You may select one of your number as foreman—I will select Mr. Rose as foreman, and you may take your ballot on the verdict where you are, and you will find for the defendant.”

(To which instruction, and in so directing the jury to return a verdict for the defendant, the plaintiff excepts.)

3.

That the said United States District Court erred in granting the defendant’s motion to direct the jury to return a verdict for the defendant, as set forth in paragraph 2 of the “Assignment of Errors.”

4.

That the United States District Court aforesaid erred in denying the plaintiff’s motion to grant a new trial upon the grounds of manifest errors set forth in said motion, as appears upon the records thereof.

5.

That the said United States District Court for Alaska, Division No. 1, erred in entering a judgment in favor of the defendant and in dismissing the action of plaintiff,

instead of entering a judgment in favor of plaintiff as prayed for in his complaint.

Wherefore, the said Ohlin H. Adsit prays that the judgment of the said United States District Court, for the District of Alaska, Division No. 1, be reversed, and said United States District Court for Alaska, Division No. 1, be ordered to enter a judgment for the plaintiff.

JOHN G. HEID,

Attorney for said Ohlin H. Adsit, Plaintiff in Error,  
Juneau, Alaska.

[Endorsed]: No. 75A. In United States District Court, at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit, vs. G. Kaufman. Assignment of Errors. Filed June 26, 1902. W. J. Hills, Clerk.

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*In the United States District Court, at Juneau, for the District  
of Alaska, Division No. 1.*

OHLIN H. ADSIT,

Plaintiff,

vs.

No. 75A.

G. KAUFMAN,

Defendant.)

**Petition for Writ of Error.**

To the Honorable MELVILLE C. BROWN, Judge of  
the United States District Court, for the District of  
Alaska, Division No. 1.

The petition of Ohlin H. Adsit respectfully shows to  
the Court, as follows:



That your petitioner is the plaintiff in the above-entitled cause; that in the said cause there was entered at the December, 1901, term of this court, held at Juneau, Alaska, in Division No. 1, a final judgment in favor of the defendant herein, adjudging the said plaintiff not entitled to recover of and from the defendant the sum of money sued for, to the prejudice and injury of your petitioner; which said judgment and proceedings incident thereto are erroneous in many particulars to the great injury and prejudice of the complainant, your petitioner.

That manifest errors have been made in this cause in the rendering of said judgment to the great damage of this complainant, your petitioner, as same fully appears from the bill of exceptions, filed in said cause, and assignment of errors filed herewith.

Wherefore, that in order for your petitioner to obtain relief in the premises, and for an opportunity to show the errors complained of, your petitioner prays that it may be allowed a writ of error in said cause; and that upon the giving, by your petitioner, a bond as required by law, all proceedings in this Court be suspended and stayed until the determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Judicial District.

And that a transcript of the records, proceedings and all papers in this cause, duly authenticated, may be transmitted to the Honorable Circuit Court of Appeals, for the Ninth Judicial Circuit of the United States, hold-

ing term at San Francisco, State of California, to determine said writ of error.

Dated, Juneau, Alaska, June 23d, 1902.

OHLIN H. ADSIT.

[Endorsed]: No. 75A. In United States District Court at Juneau, for Alaska, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Petition for Writ of Error. Filed June 24, 1902. W. J. Hills, Clerk.

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*In the United States District Court, for the District of Alaska,  
Division No. 1.*

OHLIN H. ADSIT,

Plaintiff

vs.

G. KAUFMAN,

Defendant.

No. 75A.

### **Bond on Writ of Error.**

Know all men by these presents, that we, Ohlin H. Adsit, plaintiff in error in the above-entitled cause, as principal, and V. McFarland, of the town of Juneau, Alaska, as surety, are held and firmly bound unto the above-named G. Kaufman, defendant in error, in the above-entitled action, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to be paid to the said G. Kaufman, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, exec-

utors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 25th day of June, 1902.

Whereas, the above-named Ohlin H. Adsit is about to sue out a writ of error in the above-named court, to re-examine and reverse in the Circuit Court of Appeals of the United States of America for the Ninth Circuit, the judgment rendered in the above-entitled action by the said District Court of the United States for the District of Alaska, Division No. 1, and to obtain an order and judgment of the said Circuit Court of Appeals, that the plaintiff have judgment entered in this Court as prayed for in the complaint filed herein, and that plaintiff have a new trial of his said action in said District Court of the United States for the District of Alaska, Division No. 1.

Now, therefore, the condition of this obligation, is such that if the above-bounden Ohlin H. Adsit, plaintiff in error, shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make said writ of error good, and shall obey all judgments and orders entered against him in the said Circuit Court of Appeals, under and upon his said writ of error, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

OHLIN H. ADSIT.

V. McFARLAND.

JOHN G. HEID.

Executed in the presence of:

United States of America, }  
 District of Alaska. } ss.

V. McFarland, being duly sworn, deposes and says that he is the surety named in and who executed the foregoing bond; that he is a resident and householder within the District of Alaska, and is worth the sum of five hundred dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

V. McFARLAND.

Subscribed and sworn to before me this 25th day of June, 1902.

[Notarial Seal]

JOHN G. HEID,

Notary Public for Alaska.

The foregoing bond is hereby approved as to form, sufficiency of surety, and manner of execution.

M. C. BROWN,

Judge.

[Endorsed]: No. 75A. In United States District Court, at Juneau, Division No. 1. Ohlin H. Adsit vs. G. Kaufman. Bond on Writ of Error. Filed June 26, 1902. W. J. Hills, Clerk.

And afterwards, to wit, on the 21st day of June, 1902, the following further proceedings were had and appear of record in said cause, to wit:

O. H. ADSIT	}	No. 75A.
vs.		
G. KAUFMAN		

**Order Extending Time to Perfect Writ of Error.**

Now, on this day, upon application of counsel for plaintiff herein, it is ordered that plaintiff be given ninety days in which to perfect his writ of error herein.

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**Clerk's Certificate to Transcript.**

United States of America,	}	ss
District of Alaska,		
Division No. 1.		

I, W. J. Hills, clerk of the United States District Court for the District of Alaska, Division No. 1, do hereby certify that the above and foregoing and hereto annexed forty-nine pages, are a full, true and correct transcript of the records and files of all the proceedings in the therein mentioned cause of Ohlin H. Adsit vs. G. Kaufman, as the same appears of record and on file in my office, and that the same is in accordance with the command of the writ of error in cause allowed; that this transcript has been prepared by the plaintiff in error, out of this office by permission of the Court. I further

certify that the costs of examination and certificate, amounting to \$6.35, has been paid to me by the plaintiff in error.

In testimony whereof, I have hereunto set my hand and caused the seal of Court to be hereunto affixed at Juneau, Alaska, on this 16th day of July, 1902.

[Seal]

W. J. HILLS,

Clerk United States District Court for District of Alaska,  
Division No. 1.

By J. J. Clarke,  
Deputy.

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[Endorsed]: No. 866. In the United States Circuit Court of Appeals, for the Ninth Circuit. Ohlin H. Adsit, Plaintiff in Error, vs. G. Kaufman, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed July 24, 1902.

F. D. MONCKTON,  
Clerk.